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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. MARCELLOUS LEWIS ALLEN, Defendant and Appellant.	A128830 (Contra Costa County Super. Ct. No. 050804930)

Defendant Marcellous Lewis Allen appeals his jury-trial convictions for first degree murder (Penal Code, section 187),[1] second-degree robbery (§§ 211, 212.5) and possession of an assault weapon (§12280, subd. (b)). Defendant contends: (1) his convictions should be set aside because the murder weapon found on his person was obtained by an unreasonable search and seizure in violation of his Fourth Amendment rights; and, (2) the trial court's response to a jury question about the felony murder rule inadequately explained the applicable law and effectively directed a verdict of first degree murder, in violation of his constitutional rights under the Fifth, Sixth and Fourteenth Amendments. Finding no merit in either of these contentions, we affirm the judgment.[2] However, we remand the matter for the trial court to correct the abstract of

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1 Further statutory references are to the Penal Code unless otherwise noted.

2 Allen also contends the trial court erred by failing to stay the sentence imposed for second-degree robbery, pursuant to section 654. Respondent concedes the error. We agree the trial court erred on this point. (See, e.g., *People v. Hayes* (1990) 52 Cal.3d 577, 646 [trial court should have stayed sentence for robbery where murder and robbery were part of "an indivisible course of conduct"].) We also agree with the parties that the

judgment then forward a certified copy of the corrected abstract to the Department of Corrections and Rehabilitation, (see fn. 2, *ante*).

FACTUAL AND PROCEDURAL BACKGROUND

The First Amended Information (FAI) filed in this case charges that on July 30, 2007, defendant and codefendants Dion Lee Williams and Cristian Latimore murdered Jinzhou Chang, in violation of section 187 (count one). The FAI also charged defendant and codefendants in count two with felony second-degree robbery, in violation of sections 211 and 212.5, subdivision (c). In count three, the FAI charged defendant with possession of an assault weapon, in violation of section 12280, subdivision (b). In connection with counts one and two, the FAI alleged that defendant intentionally discharged a firearm, within the meaning of section 12022.53, causing great bodily injury and death to the victim. Also, the FAI alleged that at the time of the commission of the charged offenses defendant and codefendant Latimore were minors at least 16 years of age, within the meaning of Welfare and Institutions Code, section 707, subdivision (b).

The case was tried to a jury in March 2010. According to evidence adduced at trial, on the day of the murder the victim, Jinzhou Chang, had been helping his father, Huiguan Chang, fix up an apartment on the second floor of a building on Belmont Avenue in El Cerrito. At around 6:00 p.m., Huiguan asked Jinzhou to rinse out a bucket they had been using. A few minutes later, Huiguan heard three loud bangs, followed by Jinzhou calling to him that he had been shot. Huiguan ran downstairs and found his son lying on the ground. Jinzhou told his father that three black guys robbed and shot him, and ran off toward Lassen Street. Jinzhou Chang died minutes later. The robbers took the victim's wallet, containing credit cards and a ticket to an Oakland A's baseball game. Later that evening, one of the robbers attempted to pump gas from three different pumps at a gas station in Richmond using the victim's credit cards, but each attempted purchase

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abstract of judgment must be corrected to reflect that the term imposed for counts two (burglary) and three (possession of an assault weapon) is two years, stayed as to count two and concurrent as to count three.

was declined. These attempted purchases were captured on the gas stations' video surveillance camera.

The day after the murder, at about 11:45 p.m., Contra Costa Sheriff Sergeant Roxane Gruenheid encountered defendant, codefendant Williams, and another individual named Sir Monte Bernstine.[3] During the encounter, Gruenheid discovered Bernstine had a firearm concealed on his person. A subsequent pat down search of defendant revealed a 9-mm, Cobray M Tec-11 machine pistol. Defendant and Bernstine were arrested and taken into custody. Williams, who was unarmed, was released.

On August 4, 2007, police traced the vehicle seen on the gas station's video surveillance camera to Velvet Morton. Morton was interviewed by police and informed them that Williams borrowed her car on the day of the murder. Morton recalled Williams returned the car that evening with a full tank of gas and gave her an A's ticket.

When Williams learned that police had contacted Morton in connection with Chang's murder, he made an anonymous telephone call to the Richmond Police Department, stating that defendant was responsible for the shooting and had recently been arrested in possession of the murder weapon. Subsequently, a firearms expert test-fired the gun recovered from defendant and concluded defendant's gun also fired the bullet and two shell casings recovered at the scene of the murder.

Police arrested Williams on August 5 and subsequently interviewed him. Initially, Williams denied any involvement in Chang's murder, but eventually gave police a detailed account of events surrounding the robbery and shooting. Thereafter, codefendant Latimer surrendered to police after learning police searched his home. Latimer was interviewed by law enforcement. He initially denied involvement in the crimes but subsequently implicated himself in a videotaped interview, which the jury viewed during the trial. Both Williams and Latimer received plea deals in return for truthful testimony at trial. According to their trial testimony, on the day of the murder

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[3] Evidence seized during the encounter was the subject of a suppression motion. We discuss the facts surrounding the encounter in detail *post*, in connection with the suppression issue.

Williams was driving around with Latimer, defendant and Raymond Richards in his cousin's car. The four of them had agreed to rob someone and they were looking for a target. At one point, they spotted Chang and decided to rob him. Williams, as the designated get away driver, waited in the car as the others approached Chang.

Chang was rinsing out a bucket on the sidewalk in front of an apartment complex. Defendant approached Chang from the front and Latimer and Richards approached Chang from the rear. Defendant displayed an assault pistol and demanded Chang hand over everything. Chang dropped the bucket and put his hands up. Defendant covered Chang while Latimer and Richards rifled through his pockets. Chang resisted when Richards tried to remove his wallet. Defendant came to Richards' aid and hit Chang on the head with the gun and it discharged. Latimer heard the gunshot, immediately turned and ran back towards the car. As he ran back to the car, he heard two more gunshots.

While waiting in the car, Williams heard several gunshots, then he saw his friends running towards the car. Latimer arrived first, followed by Richards and then defendant. Latimer was angry and yelled that defendant almost shot him during the robbery. Defendant stated the gun went off accidentally when he hit the victim, adding that the victim "made me shoot him."

Defendant presented an alibi defense, denying any involvement in the robbery and shooting. Defendant testified that he spent the day of the murder at a friend's house, playing video games with his friends until around 10:00 p.m. He spent the night there and went home the following day (July 31). On the evening of July 31, he met Williams and Bernstine in Richmond and all three set off to visit William's girlfriend. As they walked towards the BART station, Williams handed defendant his machine pistol and asked him to carry it. Williams explained to defendant that because defendant was under 18 years old and Williams was an adult, defendant would face less severe consequences if the police discovered the weapon on defendant.

On cross-examination, defendant admitted that when he was interviewed by police on August 6, 2007, he told police he could not remember what he was doing on the evening of the murder and did not offer the alibi presented at trial. Also, defendant could

not explain his presence at the gas station after the robbery, as captured on the surveillance videotape.

The jury began its deliberations on the morning of March 29, 2010. On April 1, the jury found defendant guilty of first degree murder, second degree robbery and possession of an assault weapon. However, the jury found not true the allegation that defendant personally used and discharged a weapon during the commission of the murder and robbery. On May 21, the trial court sentenced defendant to 25 years-to-life in state prison. Defendant filed a timely notice of appeal on May 26, 2010.

DISCUSSION

A. Motion to Suppress

1. Background

Prior to the commencement of trial, the court held an evidentiary hearing on defendant's section 1538.5 motion to suppress evidence that the murder weapon was found in defendant's possession the day after the murder. The facts adduced at the suppression hearing are as follows: On July 31, 2007, Sergeant Roxane Gruenheid of the Contra Costa County Sheriff's Office was on uniformed patrol in a marked police vehicle. At around 11:45 p.m., Sergeant Gruenheid was speaking to Deputy Shawn Welch in the Safeway parking lot on Camino Pablo in Orinda. As they were talking, Officer Welch received a call from dispatch. Dispatch relayed that an anonymous female caller reported that three black male juveniles were walking on the roadway (northbound Camino Pablo) trying to flag down passing cars; the caller stated she was alone and did not want to stop, but thought she should "advise" police of the situation.

Sergeant Gruenheid knew Officer Welch's cover officer was on a break so she offered to accompany Welch and "go see what's going on." The officers left the parking lot in separate patrol vehicles and drove north on Camino Pablo at normal speed. At one point, Officer Welch turned left into a residential area. Gruenheid continued north on Camino Pablo, and observed three black males walking in the direction she was driving and just ahead of her. She could not tell if they were juveniles. They were walking abreast of one another, one on the roadway, one on the brim that separates the roadway

from the shoulder and one just off the roadway. One of the three individuals began to wave his arm as he walked, as if trying to get the attention of the oncoming vehicle.

Sergeant Gruenheid advised dispatch she had located the young men and pulled her vehicle in about 15 feet behind them, as far over to the side of the road as she could go because there was little or no shoulder on which to park. This section of Camino Pablo Avenue is a narrow, two-lane road which would require oncoming traffic to cross the yellow median in the middle of the road way to pass Gruenheid's parked vehicle. After coming to a stop, Gruenheid remained in her vehicle and switched on the overhead lights to alert oncoming traffic of her presence. Gruenheid stated the section of the roadway where she stopped was "very dark . . . and not very well lit." When the youths saw Gruenheid stop, they turned round and walked back towards the patrol car. The driver's side window on the patrol car was down. The youths crowded around the window and began talking to Gruenheid. They were all "chattering," telling Gruenheid they got off a BART train and were trying to get to a girlfriend's house in El Sobrante.

At this juncture, Officer Gruenheid became concerned for the safety of the youths, who were standing in the roadway as they conversed: She said something like, "Hold on guys, we'll figure this out," stepped out of her vehicle and said, "Let's move over here to the front of my car so that we're not in the road of traffic." Gruenheid described the demeanor of the group at this point as "chatty, real friendly, you know. They seemed to be nice kids. . . . They were just . . . talking. They were smiling." Gruenheid testified that she spoke in a friendly tone of voice "just trying to figure out if they needed some help or what they had going on." Gruenheid identified defendant in court as one of the three youths present that evening. As the young men moved to the front of Gruenheid's vehicle, Officer Steven Welch arrived in his patrol vehicle. Welch testified that when he first drove upon the scene, Sergeant Gruenheid was just getting out of her car. Welch pulled in behind Gruenheid's police vehicle and parked. There was no reason to rush out of his vehicle. He got out of his patrol car and walked at a normal pace towards the group.

After Welch arrived, the two officers spoke to the youths at the front of Gruenheid's patrol car. The youths told them that they got off the BART train at Orinda and thought they could walk to El Sobrante. They asked the officers how they could get to El Sobrante. The officers told them they were misinformed regarding the distance from Bart to El Sobrante as it was actually about a 10-mile walk. Sergeant Gruenheid asked, "Any of you guys got any I.D.?" One of the individuals (later identified as Dion Williams) handed Gruenheid a California identification card. The others shook their heads and said no. At this point, Williams was standing in the middle of the three; defendant was to Gruenheid's left and the other (later identified as Sir Monte Bernstine) was to her right. Gruenheid glanced at Williams' ID card, turned to Bernstine and asked, "You don't have any kind of identification on you? No school card, nothing with your name or photograph on it? Gruenheid estimated that at the point she asked Bernstine about ID, she had been "on the side of the road" with the three men for "easily under a minute."

Gruenheid testified that in any street encounter with the public, including encounters with persons who appear friendly, she carries out a "safety assessment" by visually scanning the person's torso to assess for weapons. At the point Gruenheid asked Bernstine about ID, she did a safety assessment on him and her attention was drawn to his waist area, where she observed the outline of a large, irregularly shaped and heavy object under Bernstine's hooded sweatshirt. The object was of sufficient heft that it caused the front of Bernstine's sweatshirt to protrude outward from his body. Gruenheid was concerned the object could be a weapon, and asked, "What's that in your jacket?" Bernstine put both hands into the front pouch of his sweatshirt, removed them and the object was now no longer visible to Gruenheid. In response to Gruneheid's inquiry, Bernstine replied that the object was his cell phone. Gruenheid did not believe Bernstine because the object looked too heavy and bulky to be "any kind of cell phone."

Fearing for her safety, as well as that of Officer Welch, and based on her belief that Bernstine had a weapon, Gruenheid reached out with her right hand and patted Bernstine's waist area where she had observed the object. As she conducted the pat of

Bernstine's outer clothing, she felt what she immediately recognized as a handgun. Gruenheid exclaimed in an excited tone, "I have a gun." Gruenheid closed her hand around the firearm through Bernstine's clothing, grabbed his shoulder and pressed him onto the front of the police vehicle and ordered him to put his hands behind his back. Bernstine complied and was placed in handcuffs.

Officer Welch was talking to defendant and taking a note of his name and date of birth as Gruenheid spoke with Williams and Bernstein. Williams then heard Gruenheid exclaim that she'd found a gun. Welch dropped his pen and paper, drew his weapon and pointed his gun at defendant and Williams and ordered them to not to move. After Gruenheid secured the weapon discovered on Bernstine, Welch ordered defendant and Williams to get down on their knees with legs crossed and hands behind the head. Defendant and Williams complied. Gruenheid with her weapon drawn covered Welch while he pat searched defendant and Williams for weapons. As Welch pat searched defendant's outer clothing, he felt a large metal object in his waistband that he immediately recognized as a handgun. Welch handcuffed defendant before removing the weapon from his waistband.

After the submission of evidence and argument of counsel, the trial court denied defendant's section 1538.5 motion. The trial court found Sergeant Gruenheid a credible witness. The trial court concluded no illegal detention occurred; the court concluded that the encounter was consensual, and that Gruenheid's limited pat down search of Bernstine was justified on grounds of officer safety.[4]

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[4] The trial court also ruled sua sponte that there were alternative grounds to deny the section 1538.5 motion, namely that the officers were entitled to detain the minors based upon reasonable suspicion they had committed a crime or crimes, to wit, violations of Vehicle Code, sections 21956 (prohibits walking on roadway in direction of traffic) and 21957 (prohibits hitchhiking). Defendant contends the trial court violated his due process rights to a fair trial under the Fourteenth Amendment by denying his suppression motion on grounds not articulated by the officers. Respondent defends the trial court's ruling. Because we conclude the encounter at issue did not rise to the level of a detention (see Discussion, *post*), we need not address this aspect of the trial court's ruling.

2. Applicable Legal Standards

"For purposes of Fourth Amendment analysis, there are basically three levels" of police contact with the public — a consensual encounter, a detention and an arrest.[5] (*People v. Jones* (1991) 228 Cal.App.3d 519, 522 (*Jones*).) A consensual encounter is a police-individual interaction that results in "no restraint of an individual's personal liberty whatsoever, i.e., no seizure." (*Jones, supra,* 228 Cal.App.3d at pp. 522-523.) A police officer requires no objective justification to initiate a consensual encounter. (*Id.* at p. 523.)

On the other hand, a detention is the seizure of an individual that is "strictly limited in duration, scope, and purpose; and which may be undertaken by the police if there is an articulable suspicion that a person has committed or is about to commit a crime. [Citation.]" (*Jones, supra,* 228 Cal.App.3d at p. 523.) A detention occurs "only if, in view of all the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave. [Citations.]" (*Ibid.*)

The high court has stated that the test for when an individual is detained "is necessarily imprecise, because it is designed to assess the coercive effect of police conduct, taken as a whole, rather than to focus on particular details of that conduct in isolation." (*Michigan v. Chesternut* (1988) 486 U.S. 567, 573.) Furthermore, "what constitutes a restraint on liberty prompting a person to conclude that he is not free to 'leave' will vary, not only with the particular police conduct at issue, but also with the setting in which the conduct occurs." (*Ibid.*)

The California Supreme Court explained the differences between a consensual encounter and a detention in these terms: "Consensual encounters . . . require no articulable suspicion that the person has committed or is about to commit a crime. [Citation.] [¶] . . . [A] detention does not occur when a police officer merely approaches an individual on the street and asks a few questions. [Citation.] Only when the officer, *by means of physical force or show of authority*, in some manner restrains the individual's

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[5] Here, we are not concerned with the issue of arrest and do not mention it further.

liberty, does a [detention] occur. [Citation.] '[I]n order to determine whether a particular encounter constitutes a seizure, a court must consider all the circumstances surrounding the encounter to determine whether the police conduct would have communicated to a reasonable person that the person was not free to decline the officers' requests or otherwise terminate the encounter.' [Citation.] This test *assesses the coercive effect of police conduct as a whole*, rather than emphasizing particular details of that conduct in isolation. [Citation.] Circumstances establishing a seizure might include any of the following: the presence of several officers, an officer's display of a weapon, some physical touching of the person, or the use of language or of a tone of voice indicating that compliance with the officer's request might be compelled." (*In re Manuel G.* (1997) 16 Cal.4th 805, 821 [italics added].)

Furthermore, "[t]he test for the existence of a show of authority is an objective one and does not take into account the perceptions of the particular person involved. [Citation.] The test is 'not whether the citizen perceived that he was being ordered to restrict his movement, but whether the officer's words and actions would have conveyed that to a reasonable person.' [Citation]." (*People v. Garry* (2007) 156 Cal.App.4th 1100, 1106.)

3. Analysis

Defendant marshals the facts in support of his argument that his Fourth Amendment rights were violated here as follows: He notes that after the youths approached the patrol vehicle, Sergeant Gruenheid activated her emergency lights, directed them to move away from her driver's side window to the front of the police vehicle, where they were confronted by two officers and asked for identification, a request that William's complied with. Defendant also notes that the police did not advise the youths they were free to leave and characterized the encounter as a "pedestrian stop."[6]

[6] According to Officer Welch's testimony at the suppression hearing, he wrote in his police report that just before he arrived on the scene he heard Sergeant Gruenheid report to dispatch that she had "conducted a pedestrian stop." However, he testified he was not sure if Gruenheid used those exact words because police use "pedestrian stop" to

Defendant contends these circumstances compel a conclusion that he and his friends were subjected to a detention. We disagree. Rather, we conclude that in view of all the circumstances surrounding the incident, no seizure of constitutional significance occurred prior to Bernstine's pat search, which was reasonable and consistent with Fourth Amendment precedent.

In this regard, we find it significant to our analysis that the officers did not initiate the stop — defendant and his friends flagged down the police car seeking assistance. Responding to the defendants request for assistance, Sergeant Gruenheid pulled up behind the youths but did not block their direction of travel and activated her overhead lights to alert other drivers of her presence given that the road was narrow and the hour was late. As she pulled in behind the young men, they immediately walked to the police car and initiated a conversation with the officer. Defendant and his friends continued up to the driver's door and immediately began explaining their predicament to Gruenheid through the open window of the patrol car, which reflects that this was still a consensual encounter. Similarly, Gruenheid's suggestion that everyone move out of the roadway and away from her door to the front of the police vehicle was not an order or an assertion of authority over the youths. On the contrary, it was a sensible suggestion to ensure the personal safety of the youths and protect them from the danger of passing traffic. No reasonable person would have understood Gruenheid's suggestion to move out of the roadway and into the lighted area in front of the patrol vehicle in order to respond to the youths' inquiry as a command signaling a detention. Furthermore, Deputy Welch's arrival on the scene did not transform the encounter into a detention because he did nothing to assert authority over defendant and his friends. Rather, he parked his vehicle further from the group, *behind* Gruenheid's vehicle, and walked at a normal pace to join them.

The main thrust of defendant's assertion that he was detained in violation of his Fourth Amendment rights, focuses on what he characterizes as the officers' "demand" for

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describe any situation where an officer has exited a police vehicle to speak with an individual.

identification. However, it is well-established law that a mere request for identification does not automatically transform a consensual encounter into a detention. (See *Immigration and Naturalization Service et al. v. Delgado et al.* (1984) 466 U.S. 210, 216 ["interrogation relating to one's identity or a request for identification by the police does not, by itself, constitute a *Fourth Amendment* seizure"]; *People v. Cartwright* (1999) 72 Cal.App.4th 1362, 1370 ["mere request for identification does *not* transmogrify a contact into a Fourth Amendment seizure"], abrogated on another point by *Brendlin v. California* (2007) 551 U.S. 249; *People v. Castaneda* (1995) 35 Cal.App.4th 1222, 1227 [officer's request for identification "did not ─ by itself ─ escalate the encounter to a detention"].) Moreover, the officers did not address the youths in a coercive manner or in a commanding tone of voice at this juncture; rather, the trial court credited the officers' account that they merely requested identification in a friendly, conversational tone. (See *People v. Franklin* (1987) 192 Cal.App.3d 935, 941 ["It is not the nature of the question or request made by the authorities, but rather the manner or mode in which it is put to the citizen that guides us in deciding whether compliance was voluntary or not"].) Accordingly, no reasonable person would have understood the officers' request as a "demand" compelling compliance.

Defendant counters that Sergeant Gruenheid's actions went beyond a mere request for identification, and became an assertion of police authority, because she retained Williams' ID card and pressed Bernstine to provide ID, stating, "You don't have any kind of identification on you? No school card, nothing with your name or photograph on it?" Again, we disagree. The officer's follow up questions to Bernstine merely clarified her prior request by informing Bernstine that for identification purposes he could provide anything with his name *or* photograph on it, such as a school card. And in addressing Bernstine, Gruenheid continued in same conversational tone of voice she had been using throughout the encounter.

Furthermore, Gruenheid held only momentary possession of Williams' ID card and had merely glanced at it: Gruenheid did not call dispatch with Williams' information to check his name against outstanding warrants. (Cf. *People v. Bouser* (1994) 26

Cal.App.4th 1280, 1282-1283 [asking defendant his name, date of birth and prior arrest history, filling out a field interview card and running a warrant check did not amount to a detention].) Importantly, the entire encounter, from when Gruenheid left her patrol vehicle until she noticed the bulge in Bernstine's pocket, lasted barely a minute. On these facts, Gruenheid's momentary possession of William's ID card did not transform the encounter into a detention. (Cf. *People v. Terrell* (1999) 69 Cal.App.4th 1246, 1254 [holding identification for three minutes to run a warrant check did not constitute a detention].)[7]

Nor can the encounter be deemed a detention merely because Gruenheid did not inform the youths they were free to leave. Indeed, there was no reason for the officer to tell the youths they were free to leave because it was the youths who initiated the encounter by flagging the police car down in order to seek assistance. In all events, the high court has emphasized that the absence of this type of warning should be accorded no special weight and is only one factor to be considered in assessing police conduct under the totality of the circumstances. (See *United States v. Drayton et al.* (2002) 536 U.S. 194, 207 [rejecting suggestion that police officers must always inform citizens of their right to refuse when seeking permission to conduct a warrantless consent search].)

In sum, this was a very brief encounter, initiated by defendant and his companions in order to solicit the assistance of the officers and displaying none of the customary indicators of a detention. (See *In re Manuel G., supra,* 16 Cal.4th at p. 821 [noting indicators of a detention "might include any of the following: the presence of several officers, an officer's display of a weapon, some physical touching of the person, or the use of language or of a tone of voice indicating that compliance with the officer's request

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[7] As she addressed Bernstine, Gruenheid carried out a visual safety assessment on him, noticed the suspicious, bulky object at his waist and asked, "What's that in your jacket?" Assuming the detention ripened into a detention at this juncture, the officers had articulable suspicion for a detention, and the pat down searches that followed. (See *Terry v. Ohio* (1968) 392 U.S. 1, 27 [upon detaining a suspect, a police officer may undertake a patdown search for officer safety if he or she believes the suspect is armed and dangerous].)

might be compelled"].) Considering all circumstances, we conclude the officers did not restrain defendant's liberty "by means of physical force or show of authority." (*Id.*) Accordingly, defendant was not subjected to an illegal detention and the trial court did not err by denying his motion to suppress under section 1538.5.[8]

B. Response to Jury Question

1. Background

The jury began its deliberations on the morning of March 29, 2010. As the jury concluded deliberations on the following day, they sent Jury Request Number 2 (jury request), stating as follows: "Is it possible to find [defendant] guilty of robbery and not guilty of first degree murder? Specifically, if we believe Allen was not holding the gun, but was present at the robbery, is he guilty of 1st degree murder?"[9] The jury did not deliberate on March 31, a court holiday. On the morning of April 1, the court advised counsel it wished to discuss "the two jury notes we have received."

The court opined, in regard to the jury request at issue, that it "is basically a single question; that is, the second sentence starts with the word 'specifically,' so I understand them to be articulating more particularly what they intended to ask in the first question, so I think it is a single question." The court further opined that in "asking the question if he was not holding the gun but was present at the robbery," the jury request "directly inquire[s] about aiding and abetting" and how it relates to the felony murder rule. The

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[8] Accordingly, we need not reach the issue of whether defendant has standing to assert a Fourth Amendment violation based on seizure of a weapon from Mr. Bernstein.

[9] On the charge of first degree murder, the trial court instructed the jury under two theories — deliberate and premeditated murder (CALJIC 8.20) and first degree felony murder (CALJIC 8.21) The first degree felony murder instruction given by the trial court was as follows: "The unlawful killing of a human being, whether intentional, unintentional or accidental, which occurs during the commission or attempted commission of the crime of Robbery is murder of the first degree when the perpetrator had the specific intent to commit that crime. [¶] The specific intent to commit Robbery and the commission or attempted commission of that crime must be proved beyond a reasonable doubt. [¶] In law, a killing occurs during the commission or attempted commission of a felony, so long as the fatal blow is struck during its course, even if death does not then result."

court stated that when the jury asks a legal question, the court has "an obligation to respond in some way in an attempt to be helpful" without invading the jury's province or suggesting what findings the jury should make.

Defense counsel stated his preferred response was to treat the jury request as two questions and answer the first question, "Yes," and the second question, "No." The court rejected the defense counsel's preferred response. The court stated that to answer "No" to the second part of the question posed in the jury request is "simply untrue, . . . [because] he may or may not be, [depending on] whether he is an aider and abettor."

After entertaining further argument of counsel, and over defendant's objection, the court answered the jury request as follows: "If you find beyond a reasonable doubt that Mr. Allen participated in the robbery as a perpetrator or as an aider and abettor as defined in CALJIC Instructions number 3.00[10] and 3.01,[11] then you should decide whether the felony murder rule would apply as described in CALJIC Instruction number 8.21. If you have a reasonable doubt whether Mr. Allen is a perpetrator or aided and abetted the robbery, then he would not be liable under the felony murder rule. Please review these instructions in connection with CALJIC 2.90[12] and all of the other instructions I have given you." At 1:33 p.m. on the same day, the jury informed the court it had reached its

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10 The court instructed the jury on "Principals" pursuant to CALJIC 3.00, as follows: Persons who are involved in committing a crime are referred to as principals in that crime. Each principal, regardless of the extent or manner of participation is equally guilty. Principals include: [¶] 1. Those who directly and actively commit the act constituting the crime, or [¶] 2. Those who aid and abet the commission of the crime.

11 The court instructed the jury on aiding and abetting pursuant to CALJIC 3.01, as follows: "A person aids and abets the commission of a crime when he or she: [¶] (1) With knowledge of the unlawful purpose of the perpetrator, and [¶] (2) With the intent or purpose of committing or encouraging or facilitating the commission of the crime, and [¶] (3) By act or advice, aids, promotes, encourages or instigates the commission of the crime. [¶] Mere presence at the scene of a crime which does not itself assist the commission of the crime does not amount to aiding and abetting. [¶] Mere knowledge that a crime is being committed and the failure to prevent it does not amount to aiding and abetting."

12 CALJIC 2.90 describes the presumption of innocence and the People's burden of proving guilt beyond a reasonable doubt.

verdicts, finding defendant guilty of first degree murder and robbery and finding not true the allegation that he personally used and discharged a firearm in the commission of the offenses.

2. Analysis

Defendant contends that the trial court's response to the jury request presented an erroneous instruction of law that materially affected the verdict. In this regard, defendant first argues that at the time the jury sent out its request, it had decided he was present at the robbery but was not the shooter, therefore the court erred by failing to address the jury's concern for determining the liability of an aider and abettor. We disagree.

In determining the correctness of the jury instructions, we do not consider one particular instruction or part thereof in isolation; rather, we consider the entire charge of the court, and in that regard the absence of an essential element from one instruction may be cured by another instruction or the instructions taken as a whole. (See *People v. Musselwhite* (1998) 17 Cal.4th 1216, 1248.) Further, in examining the entire charge we assume that jurors are " ' " 'intelligent persons and capable of understanding and correlating all jury instructions which are given.' " [Citation.]' [Citations.]" (*People v. Guerra* (2006) 37 Cal.4th 1067, 1148.)

Here, the trial court told the jury that *if* it found beyond a reasonable doubt that defendant participated in the robbery as a perpetrator *or* an aider and abettor, then it should decide whether the felony murder rule in CALJIC 8.21 applied, i.e., whether the killing occurred "during the commission or attempted commission of the crime of Robbery." Considering the charge as a whole, and assuming the jurors understood and correlated the instructions given as we are required to, we have no trouble reaching the conclusion that the court's response to the jury request provided clear instruction to the jury that liability may attach to an aider and abettor under the felony murder rule.

Relying on the California Supreme Court's ruling in *People v. Cavitt* (2004) 33 Cal.4th 187 (*Cavitt*), defendant argues the court erred when it failed to instruct the jury that before liability can attach to an aider and abettor under the felony murder rule, the prosecution must prove that a logical nexus exists between the robbery and the murder.

However, we conclude the *Cavitt* does not assist defendant in establishing error under the circumstances presented here.

In *Cavitt*, the court sought "to clarify a nonkiller's liability for a killing 'committed in the perpetration' of an inherently dangerous felony under . . . [the] felony-murder rule." (*Cavitt, supra,* 33 Cal.4th at p. 193) The court held that, "in such circumstances, the felony-murder rule requires both a *causal relationship* and a *temporal relationship* between the underlying felony and the act resulting in death. The *causal relationship* is established by *proof of a logical nexus*, beyond mere coincidence of time and place, between the homicidal act and the underlying felony the nonkiller committed or attempted to commit.[13] The temporal relationship is established by proof the felony and the homicidal act were part of one continuous transaction." (*Cavitt, supra,* 33 Cal.4th at p. 193 [italics added].) The court explained it is not enough that the act resulting in death occurred at the same time as the felony because "the felony murder rule does not apply to nonkillers where the act resulting in death is *completely unrelated* to the underlying felony." (*Cavitt, supra,* 33 Cal.4th at p. 196, italics added.) By way of example regarding the logical nexus requirement, the court observed that "[a] burglar who happens to spy a lifelong enemy through the window of the house and fires a fatal shot . . . may have committed a killing while the robbery and burglary were taking place but cannot be said to have been 'engaged in the commission' of those crimes at the time the shot was fired." (*Id.* at p. 203.)

Furthermore, the *Cavitt* court emphasized that the logical-nexus requirement is "not a separate element of the charged crime, but, rather, a clarification of the scope of an element." (*Cavitt, supra,* 33 Cal.4th at p. 203.) Hence, "if the requisite nexus between the felony and the homicidal act is not at issue and the trial court has otherwise adequately explained the general principles of law requiring a determination whether the killing was committed in the perpetration of the felony, . . . there is no sua sponte duty to

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13 Defendant's claim of error is based on the trial court's failure to instruct on the requirement of a causal relationship—he does not assert error based on a failure to instruct on the requirement of a temporal relationship.

clarify the principles of the requisite relationship between the felony and the homicide without regard to whether the evidence supports such an instruction. [Citation.]" (*Id.* at p. 204.) Indeed, the court held that in the case at bar the trial court had no sua sponte duty to instruct on the logical nexus requirement because the evidence did not place it at issue; rather, "the murder victim was the intended target of the burglary-robbery." (*Ibid.*)

Here, the logical nexus requirement was not raised by the evidence adduced at trial. Rather, here, as in *Cavitt*, the logical nexus requirement was simply not at issue in the case because the murder victim was the intended target of the robbery.[14] Furthermore, defendant fails to identify any evidence adduced at trial that could support a theory that the killing was "completely unrelated" to the robbery. (*Cavitt, supra,* 33 Cal.4th at p. 196 ["felony murder rule does not apply to nonkillers where the act resulting in death is *completely unrelated* to the underlying felony" [italics added].)

Moreover, the jury's request focused on whether it could convict defendant if he took part in the robbery but was not the shooter. And as we concluded, *ante*, the court responded to the jury's request for guidance on that point by directing the jury to the instructions describing the liability of an aider and abettor under CALJIC 3.00 and 3.01 and by specifically informing the jury that if it harbored a reasonable doubt that defendant aided and abetted the robbery then it could not find defendant guilty of felony

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[14] Indeed, it is difficult to imagine a scenario where the logical nexus could be at issue when the murder victim is the target of the underlying felony. (See *Cavitt, supra,* 33 Cal.4th at p. 213 (conc. opn. Chin, J.) ["Rarely will a killing during a felony have no connection to that felony, but merely be coincidental. Indeed, it may be only in law-school-type hypotheticals such as the one suggested in the article the majority cites [citation] — hypothesizing one of two burglars who, while committing the burglary, just happens to spot a long-sought enemy and shoots him for reasons completely unrelated to the burglary—that the required causal relationship might be missing. Such scenarios are exceedingly unlikely in real life. *And certainly if, as is usually the case (and was here), the felony's target was killed, it is hard even to hypothesize a factual scenario in which there would be no connection between the felony and the killing*"] [italics added].) Certainly, in this case, defendant identifies no evidence that could support a finding the murder was completely unrelated to the robbery. (See *Cavitt, supra,* 33 Cal.4th at p. 196 "the felony murder rule does not apply to nonkillers where the act resulting in death is completely unrelated to the underlying felony"].)

murder. No more was required. (See *Cavitt, supra,* 33 Cal.4th at p. 204 [stating that "if the requisite nexus between the felony and the homicidal act is not at issue and the trial court has otherwise adequately explained the general principles of law requiring a determination whether the killing was committed in the perpetration of the felony," the trial court has no sua sponte duty to instruct on logical nexus].)[15] Thus, we find no instructional error, as asserted by defendant, in the trial court's response to the jury request.[16]

DISPOSITION

The judgment is affirmed. The matter is remanded for the trial court to correct the abstract of judgment and forward a certified copy of the corrected abstract to the Department of Corrections and Rehabilitation (see *ante,* fn. 2).

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Jenkins, J.

We concur:

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Pollak, Acting P. J.

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Siggins, J.

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[15] We also reject defendant's assertion that the court's failure to instruct on logical nexus effectively directed a verdict that defendant was guilty of felony murder. On the contrary, to convict defendant of felony murder, first, as instructed the jury had to determine that defendant aided and abetted the robbery, *and*, second, the jury had to determine that the murder occurred during the commission of the robbery.

[16] Finding no error in the trial court's response to the jury request, we reject defendant's contention that the court's response violated his rights under the Fifth, Sixth and Fourteenth Amendments. (See *People v. Avila* (2006) 38 Cal.4th 491, 527, fn. 22 ["[R]ejection on the merits, of a claim that the trial court erred on the issue actually before that court necessarily leads to rejection of the newly-applied constitutional 'gloss' as well. No separate constitutional discussion is required in such cases. . . ."].)